The question of the construction to be placed upon the instrument was not necessarily before the court in the present case. Its sole duty was to determine whether or not the defendant owed the plaintiff the sum of money demanded. That he did is too plain for argument, and the decision of the court upon the facts presented was plainly correct. The construction placed upon the instrument, however, may prove inconvenient in other situations. Suppose, for example, that the property should be destroyed just before the payment of the last installment. If the instrument be construed as a lease, the lessee is absolved from further payments of rent, while, on the other hand, if construed as a conditional sale, the vendee would, under the circumstances existing in this case, bear the risk of loss, and would therefore be liable for the further payment notwithstanding the destruction of the chattel.[5] If the vendor should be regarded as retaining title only by way of security for the payment of the price, as is the case where a conditional sale is made, he would at least be as amply protected as if the instrument were viewed as a lease,[6] and it is submitted that the real intention of the parties would probably be better enforced by so regarding him—an aim which the modern law in general seems anxious to attain.

W. H. S.

Sale—Express Warranty and Rescission.—Action by plaintiff to recover the remainder of the purchase price of an engine, part of the price having been paid. The answer set up the breach of a warranty. Judgment was given for the defendant for the return of the part of the price already paid.

The court found a sale with an express warranty and a breach of the warranty and a rescission by the buyer.[1] The case announces the rule expressed in former cases in California that there may be a rescission for breach of warranty in a sale.[2]

The court did not cite Sec. 1786 of the Civil Code which provides: "The breach of a warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition."

In Luitweiler Pumping Co. v. Ukiah,[2] a decision by the same court, the code section was cited. In that case, the court found that there was a breach of warranty, both express and implied. "There was also

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[5] Tufts v. Griffin, 107 N. C. 47; 12 S. E. 68; 10 L. R. A. 526; 22 Am. St. Rep. 863 (1890); Williston, Sales, Sec. 304

[6] Rayfield v. Van Meter, 120 Cal. 416; 52 Pac. 666 (1898); Hagler v. Eddy, 53 Cal. 597 (1878); Elsom v. Moore, 11 Cal. App. 379; 105 Pac. 271 (1909); Palmer v. Howard, 72 Cal. 293; 1 Am. St. R. 60; 13 Pac. 858 (1887).

[1] Harron, Rickard & McCone v. Sisk, 15 Cal. App. Dec. 223 (Sept. 6, 1912).

[2] Polhemus v. Heiman, 45 Cal. 573, 579 (1873); Hoult v. Baldwin, 67 Cal. 610; 8 Pac. 440 (1885); Luitweiler Pumping Engine Co. v. Ukiah, 16 Cal. App. 198; 116 Pac. 707 (1911).

reasonable ground for the inference that it was intended by the parties that these warranties should be regarded as a condition precedent to the sale, and therefore rescission was proper."

This seems to be the only case in California which discusses or mentions the last part of the code section. It is submitted that if the sale be executed, the warranty should operate as a condition subsequent rather than as a condition precedent. In Bannerman v. White,[3] it is said: "If the parties so intend, the sale may be absolute, with a warranty superadded; or the sale may be conditional, to be null if the warranty is broken."

In Luitweiler Pumping Co. v. Ukiah, the court found that there were both express and implied warranties. Whether there can be under the section referred, a rescission of an executed sale when the warranty is implied and not expressed remains an open question. The courts have not discussed the point in this State.

It is interesting to note that North Dakota and South Dakota have adopted code provisions similar to Sec. 1786 of the California Civil Code.[4] The North Dakota court seems to allow a rescission of an executed sale for breach of warranty,[5] while the South Dakota court denies the right.[6]

Our code section is similar to Sec. 895 of the proposed Civil Code of the State of New York, which was proposed in New York in 1867 but never adopted. The section is really an expression of the rules of two English cases, Street v. Blay,[7] and Bannerman v. White.[8]

The general English rule allows a rescission of an executory sale but not of an executed sale, and this seems to be the rule of a number of jurisdictions in this country. But, on the other hand, many jurisdictions in the United States allow a rescission of an executed sale for breach of warranty.[9] It was at one time a matter of interesting controversy as to which line of decisions was entitled to claim in California,[10] but the recent cases without doubt put this jurisdiction in the class of States allowing rescission. M. C. L.

Specific Performance: Adequacy of Consideration Under Civil Code (Cal.) § 3391: Admission of Parties or Agents to Prove Adequacy.— The cases of Dore v. Southern Pacific Railroad Company and Folger v.

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[3] Bannerman v. White, 10 C. B., N. S. 844 (1861).

[4] Civil Code, North Dakota, Sec. 3988; Civil Code, South Dakota, Sec. 1340.

[5] Cauhan v. Piano Mfg. Co., 3 N. D. 229; 55 N. W. 583 (1893).

[6] Hull v. Caldwell, 3 S. D. 451; 54 N. W. 100 (1893)

[7] 2 Barn. & Ad. 456 (1831).

[8] 10 C. B., N. S. 844 (1861).

[9] Williston, Sales, Sec. 608, and cases cited.

[10] Professor Williston in 16 Harvard Law Review 465, and 4 Columbia Law Review 195; Professor Burdick in 4 Columbia Law Review 1, 264.